

April 18, 2007

Attorney General Mike McGrath  
Department of Justice  
P.O. Box 201401  
Helena, MT 59620-1401

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Ravalli County Commissioners  
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Dear Honorable Mike McGrath:

Please accept this request for an Attorney General opinion from the Ravalli County Board of County Commissioners. As provided for in Section 2-15-501(7) of the Montana Code Annotated, a board of county commissioners has standing to make a request for a legal opinion from the Montana Attorney General's Office.

We understand the Attorney General's Office will only consider items of statewide importance and will not interpret local regulations or ordinances. While this request involves a local regulation that was enacted through the ballot initiative process, the questions posed below for your consideration are not regarding specific local regulations, but rather what rules apply to local government in the interpretation of local regulations in general. As such, this request addresses an issue of statewide importance and is not specific to a local law or ordinance.

**Questions Posed:**

1. Are the general rules of construction, which are applicable to courts in the interpretation of statutes, also applicable to local jurisdictions in interpreting and applying a county regulation enacted by ballot initiative? In particular:
  - a. Does the common law rule that the plain and ordinary meaning of the language is to be utilized in the interpretation of a statute, as required of the courts, similarly apply to local government officials in their interpretation of a county regulation enacted by ballot initiative? Furthermore, where there are technical terms utilized in a regulation, can the technical definitions be considered to help support and give guidance in establishing the plain meaning of the language included in the regulation?
  - b. Does MCA section 1-2-101, "Role of the judge -- preference to construction giving each provision meaning," and its provision that a "judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted," apply to interpretation of a county regulation enacted by ballot initiative?
  - c. Does MCA section 1-2-106, "Construction of words and phrases," and its provision that "technical words and phrases . . . are to be construed according to such peculiar and appropriate meaning or definition," apply to interpretation of a county regulation enacted by ballot initiative?

2. In the interpretation of a ballot initiative passed by the electorate, are the intentions of proponents of a ballot initiative to be considered legally relevant?
3. If the answers to questions 1 and 2 above are both affirmative, may the intentions of proponents of a ballot initiative be applied to interpret the language of the ballot initiative in a manner inconsistent with the technical meaning of technical words and phrases contained in the ballot initiative?

**Background:**

In November 2007, the voters in Ravalli County enacted interim density regulations via citizen initiative. The interim density regulations were effective upon passage of the initiative at the polls. The interim density regulations in the initiative, now established in Ravalli County as Board of County Commissioner Resolution 2038, state,

“No preliminary plat applications may be approved that provide for the building of residences at a higher density than one dwelling per two (2) acres.”

Subsequent to passage of the interim zoning regulations, the Ravalli County Planning Department, which administers zoning regulations in the County, interpreted this standard by calculating the average gross density of proposed subdivisions – i.e., the total acreage of the subject parcel divided by the number of lots – irrespective of the individual lot sizes. This is consistent with both standard definitions of the term density and conventional zoning practice, which makes a clear distinction between “minimum lot size” and “density.” Proponents of the ballot initiative expressed their concerns about this administration of the interim zoning regulation and stated that the intent of the regulation was to establish a two (2) acre minimum lot size for all subdivision applications.

The term “density” is utilized throughout the interim zoning regulations. In addition to the regulation itself, which affects residential density, the initiative language refers to “septic system densities” and “population densities”. It also describes the interim zoning regulation as relating “the ratio of dwellings to land area”.

Ravalli County has considered both the standard dictionary definitions and definitions in technical planning publications for the term “density”. For the plain meaning of the term density, one should consider that standard dictionary definitions indicate that the term density implies a ratio of objects or units to a dimension, such as a length, area or volume. For example, the term density is defined by the American Heritage Dictionary<sup>1</sup> as:

1. The quality or condition of being dense.
  - a. The quantity of something per unit measure, especially per unit length, area, or volume.
  - b. The mass per unit volume of a substance under specified conditions of pressure and temperature.

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<sup>1</sup> The American Heritage® Dictionary of the English Language, Fourth Edition. Retrieved April 18, 2007, from Dictionary.com website: <http://dictionary.reference.com/browse/density>

2. *Computer Science* The number of units of useful information contained within a linear dimension.
3. The number of individuals, such as inhabitants or housing units, per unit of area.
4. The degree of optical opacity of a medium or material, as of a photographic negative.
5. Thickness of consistency; impenetrability.
6. Complexity of structure or content.
7. Stupidity; dullness.

Similarly, Merriam Webster's Dictionary<sup>2</sup> defines density as:

1. the quality or state of being dense
2. the quantity per unit volume, unit area, or unit length: as a : the mass of a substance per unit volume b : the distribution of a quantity (as mass, electricity, or energy) per unit usually of space (as length, area, or volume) c : the average number of individuals or units per space unit <a population *density* of 500 per square mile> <a housing *density* of 10 houses per acre>
3. a : the degree of opacity of a translucent medium b : the common logarithm of the opacity

The concept that density is the expression of a relationship, or ratio, of objects/units to a dimension indicates that when one identifies the density of housing or population that it implies an average. For example, when one refers to a population density of 500 persons per square mile, that the 500 persons are not evenly spaced over the area of one square mile and when the initiative language references the "ratio of dwellings to land area" it can be assumed that it contemplates the same meaning for the spacing of housing units over an area of land as expressed in standard dictionary definitions.

The Planning Department's treatment of "density" as an average also conforms to the definitions published by the American Planning Association (APA). The APA is regarded as the preeminent organization of land use planners across the nation, and offers the most widely recognized national certification program for professional planners.

In 1999, the APA published a reference manual entitled, "A Glossary of Zoning, Development, and Planning Terms". This manual forms the basis of many definitions in Ravalli County's current subdivision regulations. It offers the following definitions, as compiled from local jurisdictions around the country:

**Density:** The number of dwelling units permitted per acre.

**Density, Gross:** The numerical value obtained by dividing the total number of dwelling units in a development by the gross area of the tract of land (in acres) within a development...

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<sup>2</sup> Merriam-Webster's Online Dictionary, retrieved April 18, 2007 from online website: <http://www.m-w.com/cgi-bin/dictionary>

**Density Zoning:** A device for averaging residential density over an entire parcel and placing no restrictions on lot sizes or on dwelling types.<sup>3</sup>

The distinction between density and minimum lot size is also illustrated by the regulations of other local jurisdictions. Several counties and municipalities in the State of Montana have adopted, in some form or another, zoning regulations that address density. For instance, the Missoula City Zoning Ordinance describes several different residential zoning districts, including the Semi-Rural Residential zone (SRR), which regulates the maximum residential density within this type of district:

The maximum residential density in the [SSR] district shall be one dwelling per five acres. For the purposes of zoning compliance for City subdivision review, lot sizes may vary for the purpose of protecting natural resources, conserving open space and enhancing environmental amenities and allowing for flexibility in site planning and project design. Lot size variations will not increase the maximum residential density for the zoning district or parent parcel.<sup>4</sup>

Some jurisdictions choose to regulate both density and minimum lot size. Section 2.11 (B) of the Missoula County Zoning Resolution proscribes the following requirement:

**Maximum residential density:** Four (4) dwellings per one (1) acre

**Minimum lot area:** Ten thousand (10,000) square feet for a single-family dwelling and fifteen thousand (15,000) square feet for a two (2) family dwelling<sup>5</sup>

Flathead County has also taken this approach. The bulk and dimension requirements for Residential Cluster (RC-1) districts provide for a maximum density of one dwelling unit per acre, and also impose a minimum lot size of 2,500 or 4,500 square feet, depending on whether residential units are attached or detached.<sup>6</sup>

The Lake County zoning regulations, which address density exclusively, are explicit in their distinction between density and minimum lot size:

**Density:** The average number of residential, commercial or industrial units allowed per acre. Density is distinct from minimum lot size. A land division may create lots that are smaller than the required density, provided that the overall average density does not exceed the maximum number of units per acre...<sup>7</sup>

Even Ravalli County has dealt with the issue of density versus minimum lot size in the past, and in one relatively recent case made a clear distinction between the two concepts. In 2005, a discussion regarding the definition of “density” arose during the public review process for the

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<sup>3</sup> A Glossary of Zoning, Development, and Planning Terms. ed. by Dolnick, Fay, and Michael Davidson. American Planning Association. Chicago. December 1999. Pp 79 - 80.

<sup>4</sup> Missoula City Zoning Ordinance. Title 19. Section 19.96.070. Revised January 18, 2007.

<sup>5</sup> Missoula County Zoning Resolution. Resolution No. 76-113. Amended January 31, 2001.

<sup>6</sup> Flathead County Zoning Regulations. Section 3.14.040(1). Resolution No. 955A. September 27, 1993.

<sup>7</sup> Lake County Zoning Map and Regulations. Section V. Effective October 1, 2005.

Grants Meadows Subdivision, located just south of Hamilton off Grantsdale Road. The proposed subdivision was located in the Doran Addition Voluntary Zoning District (VZD #18). The district standards for VZD #18 allow for a maximum residential “density” of one (1) dwelling per one (1) acre. The average lot size for the proposed subdivision was 0.83 acres, but complied with the average density requirement through the inclusion of open common space and one large lot for a total of 26 units on 26 acres. According to the minutes of the July 6, 2005, Planning Board public hearing, then- Deputy County Attorney James McCubbin stated that “a density requirement has to be interpreted as an average – not a minimum lot size.” The Board of County Commissioners conditionally approved the subdivision on August 9, 2005.

Although the definitions in standard dictionaries and in planning literature and even the language in the text of the initiative itself points to the use of the term density as a way to average the number of units or objects per dimension, the proponents of the initiative claim the intent of the regulation was not to regulate for density, but rather to establish a minimum lot size for subdivisions. The proponents’ interpretation of the interim zoning regulation appears to be inconsistent with both the plain meaning and the technical definitions for the term density.

#### **Discussion of Legal Authority:**

The basic rules of statutory interpretation are clear for the courts; however, this is not the case for local officials charged with interpretation of local rules and regulations. What makes the rules of interpretation clear for judges has been established in a multitude of cases.

**Common Law Rule.** Courts are first supposed to discern statutory intent by looking at the plain and ordinary meaning of the language. Where there are technical terms utilized, technical literature may be consulted for further guidance and given due consideration in the determination of the plain and ordinary meaning of language. A judge is “simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or omit what has been inserted.” “These rules are well-established and cited in cases too numerous to mention.” *Montanans for Equal Application of Initiative Laws v. State*, 2007 MT 75 P44-P45 (Mont. 2007)

**MCA 1-2-101. Role of the judge -- preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

**MCA 1-2-106. Construction of words and phrases.** Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

**MCA 1-2-107. Applicability of definitions.** Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

The rules of statutory interpretation clearly apply to courts when interpreting statutes; however, it is not as clear what applies to local governments when they are interpreting local regulations and ordinances. According to the Montana Supreme Court, interpretation of an ordinance is practically the same as the interpretation of a statute. *Chambers v. City of Helena*, 2002MT 142, P29 (Mont. 2002), *City of Schanz v. City of Billings* (1979), 182 Mont. 328, 332, 597 P2d 67, 69. Furthermore, courts have held that deference must be given to officials charged with application of the ordinance for zoning “when interpreting a zoning ordinance, considerable judicial deference should be accorded to the interpretation provided by an officer charged with its enforcement.” *Whistler v. Burlington NRR*, 228 Mont. 150, 156 (Mont. 1987), citing *Keller v. City of Bellingham* (1979), 92 Wash. 2d 726, 600 P2d 1276, 1280. Ultimately, we believe local government should follow the same guidelines utilized by courts for statutory interpretation when interpreting local rules and regulations,

What is not at all clear is the extent to which local government should consider the intent of proponents in the interpretation of initiative language. The will of the electorate appears to be extremely important in the consideration of an initiative. Unfortunately, we will never be certain of what the voting public “knew” or “assumed” or “thought” as they were voting at the ballot box. How then can one determine the will of the voters? If you apply the stated intentions of the proponents in the interpretation of the initiative language it presents a couple of potential problems:

- 1) It is speculative to presume the voters had the same perspective as the proponents of the initiative, which may have been significantly, or even completely, different; and
- 2) The basic principles of predictability and consistency are as important for the interpretation of an initiative enacted regulation as they are for any other rule or regulation. Furthermore, if the regulations in question go before a court, the court will apply the basic rules of statutory interpretation outlined above. Therefore, the intent of the proponents for an initiative enacted regulation is not legally relevant.

The best method for determining the will of the voters is to apply the general rules of statutory interpretation and emphasize first and foremost the plain meaning of any language in the regulation, with technical terms given appropriate technical meaning from the context in which they are utilized.

#### **Proposed Conclusions:**

1. Yes, all general rules of construction, which are applicable to courts in the interpretation of statutes, apply to counties interpreting and applying a county regulation enacted by ballot initiative, as these rules of interpretation are applicable for all interpretations of law.
2. No, the intentions of proponents of a ballot initiative are not legally relevant to the interpretation of the language of a ballot initiative passed by the electorate, because the intentions of the proponents do not necessarily reflect the intentions of the electorate that voted for the ballot initiative and who may have relied solely upon the plain language of the ballot initiative.

3. If the intentions of ballot initiative proponents are legally relevant, the meaning of language on the face of the ballot initiative (including the technical meaning of technical words and phrases) would control over inconsistent intentions of the ballot initiative proponents.

Thank you for your consideration in this matter.

Respectfully,

A handwritten signature in black ink, appearing to read 'Greg Chilcott', written over a circular stamp or seal.

Greg Chilcott

Chairman on behalf of the Ravalli County Board of County Commissioners

Cc: Chris Tweeten  
Ravalli County Attorney's Office  
Ravalli County Planning Department